Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

No. 92-467

In The

Supreme Court of the United States

October Term, 1992

JOHN V. GILLESPIE, SHERIFF,

Petitioner,

v.

DIANE HELEN MANNES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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Statement of the Case

Respondent Mannes stood trial in state court for murder and other charges stemming from a vehicular collision. After the jury convicted her on the other charges but could not agree on the murder counts, the trial judge dismissed those counts, making a written finding of insufficiency of the evidence. The State did not appeal the dismissal, but filed a new complaint alleging the same murder charges.

Mannes, by motion, objected to the new prosecution on Double Jeopardy grounds. The Magistrate of the Municipal Court orally denied the motion, upon the basis that the finding regarding the insufficiency of evidence was a "gratuitous" comment, not an acquittal. Mannes sought discretionary pretrial review of this decision from the Superior Court, the Court of Appeal, and the state Supreme Court. Each petition was denied without comment.

Mannes then petitioned the federal district court for a writ of habeas corpus. The district court issued the writ, finding that the trial judge's ruling constituted an acquittal within the meaning of the Double Jeopardy Clause. The State appealed to the Ninth Circuit Court of Appeals, contending that the district court should have abstained because the state criminal proceeding was pending, and further that there was no acquittal within the meaning of the Double Jeopardy Clause. The Court of Appeals affirmed, and the instant petition followed.

Subsequent to the filing of the petition, the Petitioner sought and obtained a recall of the mandate of the Court of Appeals, effecting a stay of the state court proceedings

pending review in this court. Mannes has served the prison sentence suffered for the convictions obtained in the first trial, and remains out of custody on parole pending resumption of proceedings in the state court.

There is now pending in the California Court of Appeal, Second District, Division Six, a petition for a discretionary writ to require the Superior Court to dismiss the pending murder charges based upon denial of state statutory speedy trial rights. The petition was filed October 16, 1992, Number B070708, and has yet to be acted upon.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Summary of Argument

The Petition sets forth three questions. The first two, concerning the Double Jeopardy Clause, involve nothing more than the application of settled principles to the particular facts at hand, hence do not warrant review by this court.

The third question involves the broader issue of the appropriate standard of review that federal courts should utilize in habeas corpus proceedings. However, this case is not an appropriate vehicle to re-examine such a far-reaching issue for several reasons. First, this issue was not adequately presented below, and should be deemed waived as the Petitioner urged the Court of Appeals to review the matter de novo.

More importantly, this is not a case which involves a collateral attack on a conviction, or other final judgement, so the reasons, as recently discussed in *Wright v. West*, *infra*, for a "deferential" standard of review are absent. The proposed "deferential" standard is inappropriate where, as here, there is no written nor binding opinion from the state courts to guide or inform the federal court.

Furthermore, in habeas petitions based upon the circumstances presented in this case, the standard of review is settled. Federal courts cannot "defer" to state court characterizations of whether a particular ruling constitutes an acquittal without abdicating enforcement of the Double Jeopardy Clause.

Additional practical and equitable reasons suggest that certiorari should be denied. Because alternate grounds supporting the judgement below exist, it is unlikely that this Court would reach the question concerning the review. The equities of the case do not favor the State, since it seeks by this petition to avoid not only the ruling of the federal district court, but also the judgement of the state trial judge, who determined that a retrial on murder charges would not be in the interests of justice. There is also a possibility that the case could become moot based upon a currently pending application in the state appellate court for a dismissal based on a violation of state statutory speedy trial rights.

ARGUMENT TO DENY CERTIORARI

I. NO REASON TO GRANT REVIEW HAS BEEN SUGGESTED IN RELATION TO THE FIRST TWO QUESTIONS PRESENTED, WHICH CONCERN THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE, AND NO SUCH REASONS EXIST

Other than to argue that the result below was wrong, the brief of Petitioner does not even attempt to assert any reasons why certiorari should be granted with respect to the first two questions, which concern the application of the Double Jeopardy Clause. This omission is understandable because the opinion below does not conflict with decisions of other circuits or of this Court, and does not announce any new or previously unsettled principle of law.

The controlling question presented in this case is whether the written finding of the state court trial judge of "insufficient evidence" of malice, made in support of his decision to dismiss those charges after a hung jury, constituted an acquittal under the Double Jeopardy Clause. The principles applicable in this context have been firmly established in *Hudson v. Louisiana*, 450 U.S. 40 (1981). The Petitioner appears to concede that the rule is clearly established and does not urge this court to reconsider its previous holdings:

> "Case law explains that a dismissal will be considered to be an implied acquittal barring retrial only if the court concludes that the evidence was insufficient *as a matter of law.*" (Petition, page 7, italics in original.)

Because the controlling principle of law is concededly established, this case involves nothing more than the application of that rule to the particular facts at hand, hence does not warrant review by this court. *United States v. Johnson*, 268 U.S. 220, 227 (1925). The district court magistrate, the district court judge, and three judges of the Court of Appeals have all reasonably found that the rule of *Hudson, supra*, was invoked by the trial court's written finding of "insufficient evidence", and this court should not disturb their findings.

II. THE THIRD QUESTION, RELATING TO THE STANDARD OF REVIEW, HAS BEEN WAIVED BY FAILURE TO ADEQUATELY PRESENT AND PRESERVE THE ISSUE BELOW

Petitioner urges that this case presents the broad question whether federal courts on habeas corpus should defer to state court rulings interpreting state court orders. The rule that Petitioner proposes is apparently that the federal court is bound by the state court's characterization of a ruling if the state court's "conclusion is a reasonable interpretation of the record." (Petition, page 20) Petitioner wishes to apply the rule to the Municipal Court Magistrate's oral ruling where the Magistrate characterized the trial judge's written findings as "gratuitous" and not a "finding as a matter of law that there was insufficient evidence." (Petition, Appendix E) This proposition is advanced for the first time here.

In the Return to the Petition for Habeas Corpus, the Petitioner filed lengthy points and authorities arguing against the issuance of the writ. No assertion was made

that the District Court was bound by the Municipal Court Magistrate's characterization if it was a "reasonable" one. The only direct reference to the Municipal Court ruling came at the bottom of page 23, where it was argued:

> "In denying the motion to dismiss, the Municipal Court aptly characterized the trial judge's comments as 'gratuitous' (Record, p. 120, lns. 13-14). Just as dicta is not binding as precedent, gratuitous comments by the trial court should be of no legal effect."

The Petitioner also failed to urge this point in the objections filed to the federal magistrate's report recommending the issuance of the writ. (Petition, Appendix I) No mention is made of the Municipal Court Magistrate's ruling in those objections filed Jan. 16, 1991. The notice accompanying the federal magistrate's report included the warning "Failure to so object within the time limit specified shall be deemed a consent to the recommendation and a waiver of any appeal."

The motion to amend the judgement and for rehearing filed by Petitioner in the District Court on February 15, 1991, is also devoid of any reference to the purportedly binding effect of the ruling of the Municipal Court Magistrate.

In Petitioner's opening brief to the Court of Appeals, page 14, under the heading "The comments of the trial judge did not constitute an implied acquittal", it was urged that the Court of Appeals review the matter de novo: "Thus the issue should be decided de novo, and no presumption of correctness should be afforded the conclusion below [citations omitted]." Later, at page 20, Petitioner in a single paragraph cited *Lewis v. Jeffers*, 497 U.S.

___, (1990) 111 L.Ed.2d 606, 622-624, 110 S.Ct. 3092, for the proposition that "[t]he District Court was bound to accept state court interpretations of **state law**" (emphasis added), referencing the Municipal Court magistrate's ruling, but never suggested that the District Court or the Court of Appeals was required to defer to the state court ruling on the mixed constitutional question of whether the trial judge's ruling constituted an acquittal within the meaning of the Double Jeopardy Clause.

The reply brief below is also devoid of reference to the proposition that the federal court was required to defer to the Municipal Court Magistrate's ruling. The Court of Appeals reviewed the matter de novo, citing *Gray v. Lewis*, 881 F.2d. 821, 822 (9th Cir. 1989) (Opinion, page 6883). Petitioner never sought rehearing, even though *Wright v. West*, 505 U.S.___, 112 S.Ct. 2482 (June 19, 1992), now relied on by Petitioner, was decided prior to the issuance of the opinion below.

The State, just as the prisoner, must adequately raise and preserve issues below, if it is to seek redress from this court. The State successfully prevented the respondent from raising her claim under *Grady v. Corbin*, 495 U.S. 508 (1990) (Opinion, note 6), having urged that "Petitioner may not raise a new issue on Appeal" (Reply Brief on Appeal, page 10, heading). The same rule should apply to the State.

III. THIS CASE DOES NOT PRESENT THE TYPE OF CONCERNS WHICH JUSTIFY A REEXAMINATION OF THE SETTLED RULE THAT MIXED CONSTITUTIONAL QUESTIONS ARE SUBJECT TO DE NOVO REVIEW IN A FEDERAL HABEAS CORPUS PROCEEDING

Petitioner urges this court to answer the question left unanswered in *Wright v. West*, 505 U.S.___, 112 S.Ct. 2482, (1992), regarding the proper standard of review in federal habeas corpus proceedings, yet the reasons suggested in that case as cause for reexamination of the holding in *Miller v. Fenton*, 474 U.S. 104, 112 (1985) confirming the de novo review standard, are absent in the context of this case.

In *Wright v. West, supra,* the habeas petition was a *collateral attack on a final judgement of conviction,* alleging that the evidence was insufficient to support a conviction. Ten years after his conviction by a jury, the habeas petition was filed in federal district court, after two rejections upon the merits of the claim by the State Supreme Court. The district court denied the writ, and the Court of Appeals reversed upon reviewing all the evidence presented to the jury.

Here, there is no final judgement of conviction, there has been no rejection of the claim upon the merits by any state appellate court, and no request made of the federal court to review evidence submitted to a jury to determine its sufficiency.

The lack of a final judgement is an important distinction because all members of the court in *Wright v. West, supra,* seemed to agree that, whatever the genesis of the

rule, the Court has "gradually come to treat as settled the rule that mixed constitutional questions are 'subject to plenary federal review' on habeas. *Miller v. Fenton*, 474 U.S. 104, 112 (1985)". *Wright, supra*, 112 S.Ct. at 2489. Yet it is urged that the decision in *Teague v. Lane*, 489 U.S. 288 (1989) conflicts with the de novo review rule. While the merits of this reasoning may be argued (see opinions of Justice O'Connor and Justice Kennedy in *Wright, supra*), it cannot be disputed that *Teague* itself can have no application where there is no final judgement, as the rule under *Teague* is that "a habeas petitioner generally cannot benefit from a new rule of criminal procedure announced *after his conviction has become final on direct appeal.*" *Wright, supra*, 112 S.Ct 2484, 2489, (emphasis added). Even if *Teague* is to cause a modification of the *Miller* rule in certain circumstances, those circumstances cannot be present where, as here, there is no final judgment.

Where there is no final judgment, there can be no diminution of the "State's significant interest in repose for concluded litigation" (*Wright, supra*, 112 S.Ct. at 2491), hence a lessened concern for "deference" exists. Neither is any concern for res judicata or law of the case implicated where federal courts properly intervene prior to a final judgement.[1]

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[1] This is not to say that other concerns are not present when a federal court interferes with a state court criminal proceeding. These concerns are well-embodied in the exhaustion of remedies requirement under 28 U.S.C. 2254 and the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). However, Petitioner has conceded that Mannes exhausted her state court remedies, and has now abandoned the claim formerly made, and resolved against them, that the District Court should have

A final criminal judgement also implies that a judge has ruled on any legal questions presented by the case, and that those rulings have been subject to some type of corrective process or review regarding the merits of those rulings (absent some procedural default). Implicit in the thesis that final state court judgements should be treated with deference is the foundational requirement that alleged state court errors in applying federal law have been subject to a "full and fair" hearing by a state reviewing court. See *Moore v. Dempsey*, 261 U.S. 86, 91, 92. Yet in this case, no state appellate court has even reviewed the Municipal Court Magistrate's ruling on the merits of the Double Jeopardy claim. Where the state has failed to provide an adequate corrective process, (see *Case v. Nebraska*, 381 U.S. 336 (1965), it can hardly complain that the federal court determines the matter de novo.

Petitioner would equate the "considered conclusions of a co-equal state judiciary" (*Miller v. Fenton, supra* 474 U.S. at 112), with the perfunctory, unreasoned and unreviewed ruling of a Municipal Court Magistrate. There is simply no articulable reason to do so. Even under state law, if Mannes were ever to be convicted of murder, the state appellate courts will subject the Double Jeopardy claim to full review.[2] There is no reason why the federal

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abstained under *Younger v. Harris, id.* (See opinion below, page 6881)

[2] Under California law, the denial of a pretrial petition for writ of prohibition or mandate is neither law of the case, nor res judicata when the petition is summarily denied without opinion. "When the court denies a writ petition without issuing an alternative writ, it does not take jurisdiction over the case; it does not give the legal issue full plenary review." *Kowis v.*

courts must defer to a ruling that the state appellate courts must review de novo. Here there is no written opinion by the state court which can serve to guide or inform the federal courts, even though the California Constitution, Article VI, § 14, requires written decisions on appellate causes. And, contrary to the assertion of the Petitioner, the question involved has nothing to do with the interpretation of state *law*, but to the interpretation of written findings, and their legal significance under the Double Jeopardy Clause. The federal courts are in a better position to attach the correct constitutional significance to the ruling than are state court magistrates.

Because the rule of de novo review of mixed constitutional questions has been firmly established, Petitioner bears "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective". *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). While future cases may present circumstances where this burden may be borne, this case does not present concerns sufficient to cause this Court to undertake to examine settled law.

IV. THE VERY NATURE OF THE DOUBLE JEOPARDY CLAIM PRESENTED HERE REQUIRES THAT FEDERAL COURTS REVIEW THE ISSUE WITHOUT DEFERENCE TO A STATE COURT PRETRIAL RULING

The Double Jeopardy Clause protects against multiple trials, as well as double punishment. Pretrial review

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Howard, 4 Cal.3d ___, 92 Daily Journal D.A.R. 15009, (November 5, 1992), *People v. Medina*, 6 Cal.3d 484 (1972).

of colorable double jeopardy claims is therefore necessary to fully vindicate the constitutional right. *Abney v. United States*, 431 U.S. 651 (1977); *Hartley v. Neely*, 701 F.2d. 780, (9th Cir. 1983). Where state remedies are exhausted, federal courts will properly entertain a pretrial habeas petition presenting a colorable double jeopardy claim. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984).

The exhaustion requirement is satisfied "once [a] federal claim has been fairly presented to the state courts". *Picard v. Connor*, 404 U.S. 270, 275 (1971). It is *not* necessary that the state appellate courts actually rule on the merits of the issue, as it is sufficient that the state courts simply have had the opportunity to rule on the merits, but declined to do so.[3]

The result of these rules is that pretrial habeas petitions based upon Double Jeopardy claims constitute a special class of cases wherein the federal district court will sometimes be required to adjudicate the prisoner's Double Jeopardy rights *prior* to any state appellate review. "Deference" to the state appellate process is simply inapplicable where that process has not taken place.

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[3] Petitioner miscites *Turner v. Compoy*, 827 F.2d 526, 529 (9th Cir. 1987) for the proposition that the denial of a pretrial petition is presumed to be on the merits. To the contrary, "The denial of an application for writ of prohibition does not constitute, and cannot be fairly read as, an adjudication on the merits of the claim presented." *Pitchess v. Davis* 421 U.S. 487, 488. See also *People v. Medina*, 6 Cal.3d. 484, 490-492. *Turner, supra*, simply stands for the proposition that an unexplained denial of a writ will not be deemed to be based upon a procedural default.

"Deference" is also inapplicable where the question concerns whether a particular ruling constitutes an acquittal for federal Double Jeopardy purposes. A state court may well find, as a matter of state law, that a ruling was not an acquittal. However the rule is settled that this Court is not bound by such a determination. *Smalis v. Pennsylvania*, 476 U.S. 143, 144, fn. 5 (1986). The reason is that the label given to the ruling under state law is simply irrelevant if "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

> "We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as 'the trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause],' *United States v. Scott*, 437 U.S. 82, 96, (1978), (citation omitted), so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding upon us." *Smalis*, 476 U.S. 143, 144, fn. 5.

Since the characterization of a ruling under state law as other than an acquittal is irrelevant under federal Double Jeopardy doctrine, the concept of "deference" to that characterization is inappropriate. When the characterization to which deference is sought is an unreviewed determination of a Municipal Court Magistrate, the thesis suffers further.

V. THE ISSUE OF THE APPROPRIATE STANDARD OF REVIEW IS NOT LIKELY TO BE REACHED BECAUSE THE JUDGEMENT BELOW IS PROPER REGARDLESS OF THE STANDARD OF REVIEW HELD APPLICABLE

In *Wright v. West, supra,* 505 U.S.___, 112 S.Ct 2482, (1992) the question concerning the appropriate standard of review was not reached because the court determined that under any standard, the result below was wrong. In this case, the result below was right, under any standard, and the issue of deference would again evade review.

The issue of whether a federal court should give deference to state court rulings in this case is a false one, since the Court of Appeals did give "deference" to the state court ruling. The opinion below clearly shows that the Court of Appeals did give careful consideration to the ruling of the Municipal Court Magistrate. The opinion quoted the oral ruling and noted that the State had adopted the Magistrate's characterization of the findings as "gratuitous" as part of its argument (Opinion, page 6886). Confronted with the issue of whether the written finding was indeed "gratuitous", the Court of Appeals "deferred" to the California Supreme Court for guidance on whether reasons for a dismissal under the Penal Code Section at issue (Section 1385) are necessary. The indisputable answer is that the statute itself requires that the reasons be entered in the minutes and the California Supreme Court has held this requirement to be mandatory (Opinion, page 6886). Thus the Magistrate's characterization of the trial judge's findings as "gratuitous" was simply wrong under any standard.

Because the trial judge's finding of "insufficient evidence" was not gratuitous, but was the reason for his dismissal, no reasonable judge could find that the ruling could constitute anything other than an "acquittal" for *federal* Double Jeopardy purposes.

Additionally, beyond the fact of the implied acquittal, other aspects of the Double Jeopardy Clause mandate that retrial for murder is barred. Because Mannes prevailed below, she is entitled to urge these meritorious grounds on review, even though they were not passed upon by the Court of Appeals, because they rest on the same facts. See *Thigpen v. Roberts*, 468 U.S. 27 (1984), *Lewis v. Jeffers*, 497 U.S.___ 110 S.Ct. 3092, 3105, fn. 3 (1990) (J. Blackmun dissenting). Each additional ground rests on undisputed facts contained in the record, and is sufficient of itself to support the issuance of the writ without reference to the standard of review.

Without attempting to argue the merits, the additional grounds are summarized as follows. Even if the trial judge's ruling can be characterized as based upon the weight rather than the sufficiency of the evidence, retrial is still barred as a successive prosecution because the order of dismissal terminated the jeopardy that unquestionably attached at the inception of the trial (and which was not terminated merely by the declaration of a mistrial). While the State could have appealed the decision of the judge to dismiss the murder charges as long as it was not held to constitute an acquittal (*United States v. Scott*, 437 U.S. 82 (1978)), it did not. Thus any new attempt to institute a *new* criminal proceeding is an impermissible successive prosecution.

Retrial is also barred under *Grady v. Corbin*, 495 U.S. 508 (1990), in that Mannes was convicted in the first trial for drunk driving causing injury arising out of the same collision. Thus she has been convicted based upon the same conduct which underlies the pending murder charges. She has now completed her prison sentence received for the previous conviction, and further punishment, imposed in a separate proceeding, for the same conduct, violates the Double Jeopardy Clause.

VI. PRACTICAL AND EQUITABLE CONSIDERATIONS COUNSEL AGAINST A GRANT OF CERTIORARI

It would be inequitable to grant certiorari in this case simply to reach the standard of review issue. All five federal judicial officers who have given this matter full review have come to the unanimous decision that the Double Jeopardy Clause bars retrial for murder. The state appellate courts could yet agree. It would be unjust and frustrate the purpose of the Double Jeopardy Clause to require Mannes to once more "run the gauntlet" in these circumstances.

It must also be considered that the trial judge undeniably believed that the interests of justice *did not* require a conviction at the level of murder for the acts committed (see Petition, Appendix D, page 2). The State seeks not justice, but the raw power to attempt to achieve a result which has already been judicially determined to be *against* the interests of justice.

The possibility exists that the matter may become moot in the future. The petition for a writ of mandate/

prohibition, presently pending in the state Court of Appeal, based upon violation of state statutory speedy trial rights, would, if granted, result in dismissal of the currently pending murder charges.

CONCLUSION

For the reasons stated above, Respondent Mannes respectfully urges this Court to deny the petition for certiorari, giving her the protection that the Double Jeopardy Clause promises.

Respectfully Submitted,

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